(2)

No. 92-1808

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANK L. WHITMER and JOAN P. WHITMER,
Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether there is a conflict among the U.S. Courts of Appeals on the question of whether a District Court's denial of a Rule 60(b) motion for relief from an order dismissing a case for want of prosecution is not an abuse of discretion where the plaintiff has failed to show mistake or excusable neglect.

LIST OF PARTIES

Respondents John Hancock Mutual Life Insurance Company, Sudler and Company, subsequently known as Sudler Marling, Inc., n/k/a National Real Estate Marketing, Inc., and General Parking Corporation are the same parties as those listed in the caption to the Petitioners' Petition.

Respondent John Hancock Mutual Life Insurance Company states, pursuant to U.S. Supreme Court Rule 29.1, that it has the following non-wholly owned subsidiaries:

John Hancock Services Internacionsis S/C Limitada

John Hancock International Services, S.A.

The Maritime Life Assurance Co.

Nahama & Weagant Energy Co.

P.T. Asuransi Pensiun Bumiputera John Hancock

British American Life & General Insurance Berhad

First Signature Bank & Trust Co.

Energy Investors Management, Inc.

JHM Capital Corp.

Capital Growth (Bermuda) Mngmt. Co., Ltd.

John Hancock Advisers International, Ltd.

British American Life Assurance Company Pte. Ltd. (Singapore)

The Interlife Assurance Company Ltd. (Thailand)

John Hancock International Services Pte. Ltd. (Singapore)

Hancock International Private Equity Management, Ltd. (England)

Dallas Gas & Electric, Inc.

Gulf States Gas Pipeline Company

National Electronic Information Corporation

Polaris Petroleums, Ltd. (Canada)

International Human Resources Development Corporation

Hotel Property Holdings, Inc.

Delmar Petroleum, Inc.

Southwide, Inc.

Holmes Protection Group, Inc.

Sudler and Company, n/k/a National Real Estate Marketing, Inc., and General Parking Corporation state that each has no parent company or subsidiary companies.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, John Hancock Mutual Life Insurance Company ("John Hancock"), Sudler and Company, n/k/a National Real Estate Marketing, Inc. ("Sudler"), and General Parking Corporation ("General Parking"), respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Court of Appeals for the Seventh Circuit's two orders in this case. The Court of Appeals' orders: (1) affirmed the District Court's denial of the Petitioners' motion filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from an order dismissing their case for want of prosecution; and (2) denied the Petitioners' Petition for Rehearing of that prior order.

OPINIONS BELOW

The Court of Appeals issued its order on December 16, 1992 affirming the order of the U.S. District Court, Northern District of Illinois, Eastern Division, dated July 1, 1991, denying the Petitioners' motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (Petitioners' Appendix 1-5).

The Court of Appeals issued a second order on February 9, 1993. This Order denied the Petitioners' Petition for Rehearing with Suggestion of Rehearing In Banc of the prior order of December 16, 1992 (Petitioners' Appendix 6).

The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated July 1, 1991, denied the Petitioners' motion for relief from judgment filed pursuant to Federal Rule of Civil Procedure 60(b).

None of the Court of Appeals' or District Court's orders are reported.

JURISDICTION

The order of the Court of Appeals was entered on December 16, 1992. Rehearing was denied on February 9, 1993. The Petitioners filed their Petition on May 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 60. Relief From Judgment or Order. . . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . .

STATEMENT OF THE CASE

A. Procedural Background Of The Litigation.

On August 30, 1977, the Petitioners moved into a condominium on the 85th floor of the John Hancock Center, located in downtown Chicago, Illinois. The Petitioners claimed certain illnesses allegedly arising from "indoor pollution" while residing in the John Hancock Center. The Plaintiffs originally filed their suit on June 10, 1987 in the U.S. District Court, Northern District of Illinois, Western Division (Rockford, Illinois).

On February 3, 1988, the Petitioners filed their first amended complaint. The Petitioners did not issue any summonses in this case until the filing of the first amended complaint, approximately eight months after the filing of the original complaint.

John Hancock and Sudler filed a motion to dismiss and, on April 25, 1988, a memorandum in support as to all counts of the first amended complaint. General Parking filed its motion to dismiss on March 3, 1988 and filed its

memorandum in support on May 10, 1988. Various other Defendants also filed motions to dismiss or motions for summary judgment. The Petitioners never responded to John Hancock, Sudler and General Parking's motions to dismiss and the merits were never addressed. On at least four occasions, the District Court set briefing schedules on these motions to dismiss.

In early 1988, certain Defendants moved for a change of venue and this motion was granted on October 2, 1989, transferring the case to the U.S. District Court for the Northern District of Illinois, Eastern Division.

John Hancock and Sudler served subpoenas for records against the Petitioners' physicians who have provided affidavits for the Petitioners. Soon thereafter, the Petitioners filed a motion to quash subpoena and sent a letter to at least one of the physicians, Dr. Ebbesen, stating that the subpoenas were "improper," "harassing," and were served in "obvious retaliation for your dedicated concern for the health of your patients." After hearing on December 30, 1988, the magistrate in the Western Division denied the motion to quash and required the doctors to produce records from a date certain to the present.

The Petitioners thereafter filed a "Motion to Vacate or Modify or in the Alternative for Rehearing/Reconsideration of Said Ruling," which was subsequently denied by the magistrate. After that ruling, the Petitioners filed another motion disputing the Defendants' rights to the doctors' records. On September 22, 1989, the Defendants filed a motion to compel discovery directed to the subpoenas for the doctors' records. The documents demanded have never been produced from any of the physicians or from the Petitioners. In addition, on three occasions the District Court ordered the Petitioners to respond to the

Defendant City of Chicago's interrogatories and production request. The Petitioners never answered this discovery.

The District Court held a status hearing on January 24, 1990 and ordered that the next status hearing be held on June 26, 1990. Neither Petitioner appeared for the June 26 status hearing although Joan Whitmer was in the courthouse at the time of the status hearing. On June 26, 1990, the District Court, therefore, ordered the cause dismissed for want of prosecution. The Petitioners filed a joint notice of appeal from the dismissal. The Petitioners' appeal was dismissed for want of prosecution by the U.S. Court of Appeals for the Seventh Circuit on May 10, 1991. The Petitioners filed a Petition for Writ of Certiorari from this order, which was docketed in this Court under Case No. 91-756. This Court denied that petition. *Whitmer v. John Hancock Mutual Life Ins. Co.*, ____ U.S. ____, 112 S.Ct. 875 (1992). This Court also denied rehearing. *Whitmer, supra*, ____ U.S. ____, 112 S.Ct. 2001 (1992).

On July 27, 1990, the Petitioners filed an "Emergency Verified Motion for Relief From Order to Vacate and Reinstate Cause," which referred to Federal Rule of Civil Procedure 60(b). The District Court entered a stay on this motion pending resolution of Petitioners' Petition for Writ of Certiorari, this Court's Case No. 89-1984. This Court denied the Petition. *Whitmer v. John Hancock Mutual Life Ins. Co.*, 498 U.S. 822, 111 S.Ct. 72 (1990).

On May 1, 1991, the Petitioners filed a notice of filing and motion for District Court's inclination to grant Rule 60(b) relief. John Hancock, Sudler and General Parking filed an answer to the motion for inclination and a response to the Rule 60(b) motion. The Petitioners filed their reply on June 19, 1991. On July 1, 1991, the District Court

denied the Petitioners' motion for Rule 60(b) relief. On July 17, 1991, the Petitioners filed a motion to reconsider the District Court's denial of their motion and filed an addendum on July 19, 1991. The District Court denied the motion to reconsider on July 24, 1991. On August 1, 1991, the Petitioners filed their notice of appeal.

On December 16, 1992, the U.S. Court of Appeals for the Seventh Circuit issued its order which affirmed the District Court's denial of the Petitioners' motion for Rule 60(b) relief. On January 26, 1993, the Petitioners filed their Petition for Rehearing with Suggestion for Rehearing In Banc. On February 9, 1993, the Seventh Circuit issued an order denying the Petitioners' Petition for Rehearing.

Since filing their original complaint in June of 1987, the Petitioners filed approximately 30 motions for extensions of time or stays in the District Court alone. The Petitioners were granted extensions of time on 12 occasions. In the Seventh Circuit, the Petitioners filed four similar motions in their first appeal (Case No. 89-3241), seven similar motions in their second appeal (Case No. 90-2888), and nine similar motions in their third appeal (Case No. 91-2805). The Petitioners have also filed at least three similar motions with this Court in prior appeals.

B. Issues Presented By The Petitioners Which Are Not Before This Honorable Court.

The Petitioners' "Questions Presented" section of their Petition lists eight questions, only two of which, questions number 5 and 7, are arguably before this Court. The only real issue arising from the U.S. Court of Appeals for the Seventh Circuit's order is whether the Court of Appeals properly affirmed the District Court's denial of the Petitioners' Rule 60(b) motion as not being an abuse of

discretion. All of the other questions presented by the Petitioners are not addressed by the Court of Appeals' order and are not, therefore, before this Court. In addition, questions 1, 2, 3 and 6 are unintelligible.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petitioners argue innumerable points in their Petition, only one of which is arguably before this Court and none of which approach the kind of important constitutional or policy question which this Court should exercise its discretion to hear. Furthermore, the only issue before this Court, whether the Court of Appeals properly found that the District Court's denial of the Petitioner's motion for relief pursuant to Rule 60(b) was not an abuse of discretion, does not present an issue which involves a conflict in the decisions of the U.S. Courts of Appeals.

I.

THERE IS NO CONFLICT AMONG THE U.S. COURTS OF APPEALS. THE U.S. COURTS OF APPEALS HAVE CONSISTENTLY HELD THAT A DISTRICT COURT'S DENIAL OF A RULE 60(b) MOTION FOR RELIEF FROM AN ORDER DISMISSING A CASE FOR WANT OF PROSECUTION IS NOT AN ABUSE OF DISCRETION WHERE THE PLAINTIFF HAS FAILED TO SHOW MISTAKE OR EXCUSABLE NEGLECT.

The Seventh Circuit affirmed the District Court's order denying the Petitioners' motion for Rule 60(b) relief and found that the District Court did not abuse its discretion in denying that motion. In its order, the Seventh Circuit

held that the only grounds listed in Rule 60(b) raised by the Petitioners on appeal were mistake and excusable neglect (Petitioners' Appendix 2). The Petitioners have not contested this finding in their Petition. A review of the decisions of the United States Courts of Appeals for the District of Columbia, First, Second, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits shows that all have affirmed a District Court's denial of a motion for Rule 60(b) relief from a dismissal for want of prosecution as not being an abuse of discretion where the plaintiff has failed to show mistake or excusable neglect. Since there is no conflict among the Courts of Appeals on this issue, there is no basis for this Honorable Court to exercise its judicial discretion under Supreme Court Rule 10. This Honorable Court should, therefore, deny the Petitioners' Petition for Writ of Certiorari. The particular U.S. Courts of Appeals and their holdings on this issue are as follows:

D.C. Circuit: *Shaeffer v. Warehouse Employees Union, Local No. 730*, 408 F.2d 204, 206-207 (D.C. Cir. 1969), *cert. denied.*, 395 U.S. 934, 89 S.Ct. 1996 (1969) (Court of Appeals affirmed the District Court's denial of plaintiff's Rule 60(b) motion to vacate a dismissal for want of prosecution as not being an abuse of discretion in light of the plaintiff's dilatory conduct).

First Circuit: *Kaercher v. Trustees of Health and Hospitals of City of Boston*, 834 F.2d 31, 34-35 (1st Cir. 1987) (Court of Appeals held that the District Court did not abuse its discretion in denying the plaintiff's Rule 60(b) motion from a dismissal for want of prosecution due to counsel's failure to appear for pre-trial conference, based on the pattern of delay and neglect in the case).

Second Circuit: *Cucurillo v. Schulte, Bruns Schiff Gesellschaft, M.B.H.*, 324 F.2d 234, 235 (2d Cir. 1963) (Court of Appeals affirmed the District Court's denial

of the plaintiffs' Rule 60(b) motion to vacate an order dismissing the case for want of prosecution when the plaintiff had done nothing to prosecute the suit since filing answers to interrogatories).

Fifth Circuit: *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287-289 (5th Cir. 1985) (Court of Appeals treated a motion to reinstate as a Rule 60(b) motion and affirmed the District Court's denial of that motion from an order dismissing the case for want of prosecution due to counsel's failure to appear at a motion conference).

Sixth Circuit: *Buck v. U.S. Department of Agriculture, Farmers Home Admin.*, 960 F.2d 603, 608-609 (6th Cir. 1992) (Court of Appeals affirmed the District Court's denial of plaintiffs' Rule 60(b) motion to set aside an order dismissing the case for want of prosecution due to counsel's failure to comply with a court order as not being an abuse of discretion).

Seventh Circuit: *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 607-609 (7th Cir. 1986) (Court of Appeals found no abuse of discretion in the District Court's refusal to vacate a dismissal under Rule 60(b) due to counsel's failure to respond to a motion to dismiss and attend a pretrial conference).

Eighth Circuit: *Fox v. Brewer*, 620 F.2d 177, 180-181 (8th Cir. 1980) (Court of Appeals treated a motion to reconsider as a Rule 60(b) motion and affirmed the District Court's denial of that motion from a dismissal for want of prosecution due to plaintiff's lack of action for one year as not being an abuse of discretion).

Ninth Circuit: *Whale v. United States*, 792 F.2d 951, 952, 954 (9th Cir. 1986) (Court of Appeals affirmed the District Court's denial of a Rule 60(b) motion from a dismissal for failure to prosecute as not being an abuse of discretion).

Eleventh Circuit: *Garner v. Griffith*, 391 F.2d 934 (11th Cir. 1968) (Court of Appeals affirmed the District Court's denial of the plaintiff's Rule 60(b)(1) motion to vacate an order dismissing the case for want of prosecution as not being an abuse of discretion).

Not only is there no conflict among the U.S. Courts of Appeals on this issue, the Seventh Circuit's decision in the instant case is proper. The Petitioners' Rule 60(b) motion set forth no reasons to justify vacating the District Court's order dismissing their case for want of prosecution for either mistake or excusable neglect. The only "facts" in the Rule 60(b) motion which provide a possible explanation for failure to appear at the status hearing were unsupported. For example, Frank Whitmer alleges that four days after the entry of the dismissal, he was diagnosed as having an ulcer and was under medical care. This allegation was not, however, supported by the exhibits attached to the motion. Furthermore, the Petitioners had no reasonable basis to believe that the June 26th status would not be held since that status date was never vacated. In addition, Joan Whitmer was in the courthouse on the day of the status hearing but did not attend the hearing.

The history of this case also reflects a record of dilatory conduct by the Petitioners, as recognized by the Seventh Circuit. By June 26, 1990, the Petitioners had filed approximately 30 requests for extensions of time or stays in the District Court alone and had been granted continuances on 12 occasions. The Petitioners had also engaged in other dilatory tactics, such as failing to issue summonses for eight months, repeatedly challenging orders regarding subpoenas for records, filing two appeals in the U.S. Court of Appeals for the Seventh Circuit which were dismissed, and filing two Petitions for Writ of Certiorari in this Court which this Court denied.

The Petitioners simply have made no attempt to prosecute this case since the inception of the case. Instead, through an endless series of motions for stay of proceedings, for time enlargement, for sanctions, and for unfounded and trivial appeals, all of the Petitioners' efforts were directed at preventing the District Court and the parties from addressing any issues raised by the complaint. For example, the Petitioners never responded to John Hancock, Sudler and General Parking's motions to dismiss, which were filed and briefed over four years ago. These motions to dismiss were never resolved. It could not be more evident that the Petitioners' efforts were never not directed toward prosecuting their action, but to delaying it.

Finally, many of the facts set forth at pages 15 through 16 of the Petition are simply wrong. All motions to dismiss were filed less than three months after the Petitioners filed their first amended complaint. Regarding the Petitioners' motion for clarification of the trial court record, the Petitioners originally filed this motion in August of 1989 and renewed the motion on October 20, 1989. The District Court judge ruled on this motion within six days. Regarding the time between the order transferring the case to the Eastern Division and the order setting a briefing schedule on the motions to dismiss, the Petitioners requested a stay of proceedings during that time. Regarding the Petitioners' emergency health motion filed in March of 1990, the Petitioners filed at least one subsequent motion for a stay and on June 12, 1990, all stays were lifted. Contrary to the Petitioners' argument, this case was not delayed due to actions by the District Court but due to actions of the Petitioners.

II.

THIS APPEAL DOES NOT INVOLVE ANY ORDERS ENTERED BY THE SEVENTH CIRCUIT OR THE DISTRICT COURT PRIOR TO THE DENIAL OF THE PETITIONERS' RULE 60(b) MOTION.

Throughout their Petition, the Petitioners refer to the proceedings in their prior appeal from the underlying order dismissing their case for want of prosecution, which was docketed under Seventh Circuit Case No. 90-2888. The Petitioners also attach numerous orders from this appeal in the Appendix to their Petition. The issues raised in this prior appeal are irrelevant for two reasons.

First, the Petitioners filed a Petition for the Issuance of a Writ of Certiorari from the prior appeal, which was docketed in this Court under Case No. 91-756. This Court not only denied the Petition, but also denied the Petitioners' Petition for Rehearing. *Whitmer v. John Hancock Mutual Life Ins. Co.*, ____ U.S. ____, 112 S.Ct. 875 (1992), *reh'g denied*, ____ U.S. ____, 112 S.Ct. 2001 (1992). Second, any issues regarding the District Court's order dismissing the Petitioners' case for want of prosecution are not properly before this Court. This Court has held that review of a denial of a Rule 60(b) motion does not raise the underlying judgment for review. *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 263, 98 S.Ct. 556, 560, fn.7 (1978).

At pages nine through twelve of their Petition, the Petitioners refer to their request made to the District Court for its "inclination" to grant their motion for relief under Rule 60(b). This argument is now moot since the District Court denied the Petitioners' Rule 60(b) motion and the Petitioners are currently seeking review of that order. Furthermore, this issue arose in the Petitioners' prior

appeal and, therefore, has already been ruled on by this Court.

Even if this argument were relevant, the District Court and Seventh Circuit did not follow an improper procedure. There is no requirement under Rule 60(b) that a District Court grant a Rule 60(b) motion, let alone issue a decision indicating its inclination to grant such a motion. A Court of Appeals is also not required to remand an appeal if a Rule 60(b) motion is pending. Instead, the Circuit Courts of Appeals are in agreement that only if a party files a motion under Rule 60(b) while an appeal is pending, and only if the District Court also indicates it will allow the motion, then the Court of Appeals should be requested to remand the cause. *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979); *Ryan v. United States Lines Company*, 303 F.2d 430, 434 (2d Cir. 1962); *Ferrell v. Trailmobile, Inc.*, 223 F.2d 697, 699 (5th Cir. 1955); *Textile Banking Co., Inc. v. Rentschler*, 657 F.2d 844, 849-850 (7th Cir. 1981); *Winter v. Cerro Gordo County Conservation Board*, 925 F.2d-1069, 1073 (8th Cir. 1991); *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976), *cert. denied*, 429 U.S. 896, 97 S.Ct. 259 (1976); *Aune v. Reynders*, 344 F.2d 835, 841 (10th Cir. 1965); *Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952). In the instant case, the District Court did not indicate its inclination to grant the Petitioners' Rule 60(b) motion while their prior appeal was pending.

CONCLUSION

The only issue before this Honorable Court is whether there is a conflict among the U.S. Courts of Appeals on the issue of whether a District Court's denial of a Rule

60(b) motion for relief from an order dismissing a case for want of prosecution is not an abuse of discretion where the plaintiff has failed to show mistake or excusable neglect. There is no conflict among the U.S. Courts of Appeals on this issue. The issues raised by the Petitioners are without merit. The Petition should be denied forthwith.

Respectfully submitted,

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